

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES**

**INFINITI OF MONTCLAIR**

**and**

**Case 21-CA-36952**

**NICK VALENTI, An Individual**

***Winkfield F. Twyman, Jr., Esq.,*  
of Los Angeles, California,  
on behalf of the General Counsel**

***Warren L. Nelson, Esq., (Fisher & Phillips, LLP)*  
of Irvine, California and,  
*Richard Stavin, Esq.,* of Montclair, California,  
on behalf of Respondent.**

**DECISION**

**BURTON LITVACK: ADMINISTRATIVE LAW JUDGE**

**Statement of the Case**

Nick Valenti, an individual, filed the original and amended unfair labor practice charges in the above-captioned matter on July 18 and October 11, 2005, respectively. After investigations, on November 23, 2005, the Regional Director of Region 21 of the National Labor Relations Board, herein called the Board, issued a complaint, alleging that Infiniti of Montclair, herein called Respondent, engaged in, and continues to engage in, unfair labor practices, violative of Section 8(a)(1) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, a trial of the above-captioned matter was held before the above-named administrative law judge on February 6 through 8 and March 9 and 10, 2006 in Los Angeles, California. At the said trial, counsel for the General Counsel and counsel for Respondent were permitted to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to argue their respective legal positions orally and to file post-hearing briefs. Said briefs were filed by counsel for the General Counsel and by counsel for Respondent, and each brief has been carefully examined. Accordingly, based upon the entire record, including the post-hearing briefs and my resolution of the credibility of the several witnesses,<sup>1</sup> I make the following:

---

<sup>1</sup> Before each witness testified, I advised him or her of the necessity of being truthful and gave each the opportunity to not testify if he or she felt unable to testify truthfully. No prospective witness declined to testify.

## Findings of Fact

### I. Jurisdiction

At all times material herein, Respondent, a State of California corporation, with an office and place of business, herein called Respondent's facility, located in Montclair, California, has been engaged in the business of automotive sales and service. During the 12-month period ending October 27, 2005, which period is representative of its operations, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000 and sold and shipped from its Montclair, California facility goods valued in excess of \$50,000 directly to customers located outside the State of California. Respondent admits that, at all times material herein, it has been an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. The Issues

The General Counsel alleges in the complaint that Valenti, on behalf of himself and other employees, engaged in protected concerted activities by complaining to management officials about another employee taking and receiving credit for repair orders, which they had prepared,<sup>2</sup> and that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act, by discharging Valenti because he engaged in the above-described acts and conduct and to discourage other employees from engaging in these or similar protected concerted activities. The General Counsel also alleges in the complaint that Respondent violated Section 8(a)(1) of the Act by, through its supervisors and agents, telling an employee that he was fired for engaging in protected concerted activities, by telling an employee that another employee had been discharged for engaging in protected concerted activities, and by interrogating an employee concerning his protected concerted activities and the protected concerted activities of other employees. Respondent denied engaging in the alleged unfair labor practices and asserts that it discharged Valenti after the latter had abandoned his job.

### III. The Alleged Unfair Labor Practices

Respondent, a State of California corporation, operates a typical automobile dealership in Montclair, California selling new and used Infiniti automobiles and used vehicles manufactured by other automotive companies, servicing and repairing Infiniti vehicles, and selling Infiniti automotive parts and products. Respondent's facility, which includes a three story sales building and a detached 1000 square foot service facility, shares a cul-de-sac with three other automobile dealerships, is located next to a Nissan dealership and shares a common service aisle with the latter, and, at its facility, Respondent employs approximately 55 individuals, working in all job classifications associated with an automobile dealership. Courter Cerami is Respondent's general manager and is responsible for overseeing the day-to-day operations of its facility including parts, service, and sales, and Joseph G. Nickell is the service

---

<sup>2</sup> At the trial, counsel for the General Counsel was granted permission to amend paragraph 5(a) of the complaint by deleting that Valenti engaged in protected concerted activities by requesting that management officials institute an "open aisle appointment system for its service advisor employees." Counsel so acted after Valenti, who had originally testified that instituting an open aisle system was a topic of discussion amongst Respondent's service advisors and that the consensus was to request management to agree to do so, admitted, during rebuttal testimony, that no other employee told him he or she wanted such a system instituted or deputized him, on his or her behalf, to petition management to institute such a change.

director for Respondent, supervising 21 individuals including service advisors, greeters, porters, and technicians.<sup>3</sup> The record establishes that the Charging Party, Nicholas Valenti, was hired by Respondent in November, 2004 to work as a service advisor and worked in that capacity until mid-April 2005, and that, as of the latter date, Respondent employed three other service advisors -- Keith Marshall, Dominic Vettraino, and Maritza Aguillard.<sup>4</sup> Respondent's service advisors are responsible for making appointments for customers to bring their cars to the dealership for service and/or repair; greeting customers and obtaining necessary information pertaining to the vehicle number and mileage; drafting repair orders, which set forth the service to be performed, any problems with the operation of the customer's vehicle, and the estimated cost of the service and any repairs, for the customers; and arranging for loaner cars or taking care of customer transportation requirements. They are also responsible for subsequently explaining to the customer the necessity for any repair work performed on the vehicle and additional repairs, which the technicians, who work on the cars, discover and deem necessary, and the cost of said repairs or whether such are covered by warranty and preparing for the customer a final invoice-signature copy of the work order,<sup>5</sup> which is necessary for presentation to the cashier for payment. The latter document contains information pertaining to the cost of any maintenance work performed on the vehicle, including an accounting of the exact work performed, the technician's time spent performing each task, and the cost of any labor, parts, and new fluids.<sup>6</sup> The record further establishes that, other than Marshall, Respondent's service advisors are compensated by a regular salary and a commission, calculated upon the total cost of parts, labor, warranty, and the customer payment, which is received by the dealership for work done on customer vehicles.<sup>7</sup> Also, the service advisors receive a bonus based upon customer satisfaction with their work.

Although Cerami ultimately approved his hire by Respondent, Valenti was essentially hired for his service advisor job upon the recommendation of Joe Nickell. In this regard, the record reveals that Valenti and Nickell have had a longstanding business and personal relationship. Thus, prior to being hired by Respondent, Valenti had been acquainted with Nickell since 1998 when the latter hired Valenti to work as a service advisor at Riverside Lincoln-Mercury, which was subsequently sold and became known as Alvarez Lincoln-Mercury. They became close friends there, and, in 2001, when Nickell left Alvarez Lincoln Mercury to

---

<sup>3</sup> Respondent admitted that Cerami and Nickell are supervisors and agents within the meaning of Sections 2(11) and (13) of the Act.

<sup>4</sup> The service consultants work in the service office area, which consists of four glass walled offices and the service manager's office. Each service advisor has an office in which there is a desk, chairs, and a computer terminal on the desk. Also, there is a customer waiting area in which a coffee machine and cookies are available for customers, who are waiting for cars to be serviced.

<sup>5</sup> The work order and invoice-signature copy bear a common work order number, date, and a space for the name of the service advisor, who worked with and sold the service to the customer.

<sup>6</sup> While the foregoing job duties apparently were those of Valenti, Vettraino, and Aguillard, Keith Marshall was responsible for Respondent's "internal workings." In this regard, his customer is Respondent's sales department, and his work involves selling so-called ad-ons, including chrome wheels, spoilers, and similar items, to customers, who are buying new and used vehicles from Respondent. Marshall only performs normal service advisor duties during instances of customer overflow.

<sup>7</sup> The commission (six percent) is calculated upon the total price, which appears on the invoice-signature copy, for the customer's work.

work for a corporation, which owned three dealerships, including Norco Mitsubishi, he hired Valenti to work as the service manager at the latter location. Nickell left that job in 2003 for his present job with Respondent, and, four months later, after Norco Mitsubishi terminated Valenti's employment, when a position became open, Nickell informed him of the available job with Respondent and supported his hire. With regard to employment at Alvarez Lincoln-Mercury, there is no dispute that Valenti walked off the job for one day. According to Valenti, he did so only after Nickell became angry and picked up the computer, which was on the Charging Party's desk, ripped it from the wall, and flung it to the floor. While Nickell admitted picking up Valenti's computer and throwing it to the floor on one occasion, he testified that it was not on the day when Valenti walked off the job and stated that the latter incident occurred because Valenti refused to work on Saturdays. Nickell gave Valenti a warning notice for leaving the job without permission, and the parties stipulated that, if called to testify, Roger Ruiz, who was also employed as a service advisor at Alvarez Lincoln-Mercury and who was fired by Nickell, would have testified that, "on the day Mr. Valenti walked off the job at Alvarez Lincoln-Mercury, Mr. Valenti's computer was destroyed."

The General Counsel alleges and, during his direct examination, Valenti maintained that he was fired on April 14, 2005. Valenti testified that, approximately a week before, on or about April 5 or 6, he was talking to Marshall and Aguillard inside the customer waiting area, and Aguillard gave him copies of General Counsel's Exhibit No. 4, a work order and an invoice-signature copy for work order No. 98118, dated January 26, 2005, pointed out that, while her name appears on the work order, Dominic Vettraino's name appears on the invoice-signature copy, and said that "... she did all the work, [Vettraino] collected the money and then he helped himself to collect the commission money also on it." She added "... she was very disappointed that ... this had happened to her, that Vettraino was changing repair orders ... and Keith ... agreed ... [saying] this happens all the time." Aguillard also "... said that she was a little discouraged because she had spoken to Joe Nickell back [in January]," and he told her not to worry as he would take care of it. However, it was now April and she was still waiting. To this, Marshall said that he also had spoken to Nickell about "certain things" and "... that this happened to him all the time, consistently, with the same person." Marshall added that he had complained but nothing had been done. Valenti asked if he had any tickets like Maritza; Marshall replied that he would have to "dig them out." Then, according to Valenti, he "... said, well ... let me go talk to [Nickell] and we will see what we can do and see if he will ... change it," and the others agreed. Valenti further testified he was "very shocked" that one service advisor would steal another service advisor's work because they "all" were working "in the same business," and what Vettraino had done was "stealing" because Aguillard wrote the repair order and contacted the customer that he car was ready to go. He further stated that, while another service advisor occasionally may draft and take an invoice-signature copy and a customer's credit card to the cashier, the second advisor does not change the name on the work order<sup>8</sup> and that what Vettraino allegedly did could only be accomplished "... by going into the computer and taking the one person's name out, putting their's in, and then closing the repair order."

Valenti next testified that, as a result of his conversation with Aguillard and Marshall, approximately a week later, at 9:00 a.m., on April 12, he went to speak to Nickell in the latter's

---

<sup>8</sup> Valenti acknowledged that, on occasion, a second service advisor may take credit for work done for a customer but that such is only done with the permission of the service advisor, who wrote the work order. Asked if he ever gave such permission, Valenti said that, if a service advisor was going to be absent the next day, "... you would tell another service advisor ... you take this one and go ahead and complete it. If you were going on a vacation day or something like that, you would do it."

office, and "... I was talking about ... the orders being changed" and "... we wanted this to be stopped. Mr. Nickell said that his father-in-law was dying at a hospital and that he was going to be gone for a week or so. He said, but before I leave today, I will talk to each service advisor and get this fixed."<sup>9</sup> Later in the day, after Nickell left to be with his father-in-law, Valenti spoke to Aguillard and Marshall and told them Nickell would speak to each that day about the changing of names on invoice-signature copies of work orders. Nickell did not come to work on April 13, and, after speaking to Aguillard and Marshall, Valenti learned that the service manager had not spoken to either the day before regarding the above matter. Therefore, the three of them decided that Valenti and Marshall would speak to Cerami, and, at approximately 3:00 p.m., Valenti himself found Cerami outside in the service aisle between the Infiniti and Nissan dealerships. Cerami was also by himself, and Valenti walked over to him, saying "... `Cordy, I got a little bit of a concern. Myself, Maritza, and Keith have a concern about Dominic changing our repair orders....' I said to him that Mr. Nickell was supposed to talk to us yesterday and get this thing straightened out but as always he didn't. And I said, you ... can help us in this matter. ... And he said, `No problem. Joe is going to be gone for about a week. Gather the evidence. ... and when Joe Nickell comes back, we will sit down and get this fixed.'"<sup>10</sup> Valenti thanked him, walked back to his service advisor office, and, given Cerami's injunction to gather the evidence, immediately began searching through his own repair orders in order to ascertain if any had been changed so that someone else received credit for his work. "And ... I found two repair orders that were changed from my name to Dominic Vettraino's without my authorization." The two repair orders and invoice-signature copies were received as General Counsel's Exhibits Nos. 5(a) and (b). The former, work order No. 00810, is dated April 8, 2005 and has Valenti's name on the work order copy and Vettraino's name on the invoice, and the latter, work order No. 00819, is likewise dated April 8, 2005 and has Valenti's name on the work order and Vettraino's name on the invoice-signature copy.<sup>11</sup>

Valenti next testified, during his direct examination, that, sometime between 9:30 and 10:00 a.m. the next morning (April 14), he was outside in the service aisle when Aguillard came outside and told him that Nickell was on the telephone, and "... he was pretty mad." Inside his office, Valenti picked up the telephone, and Nickell immediately spoke, saying, "You dirty motherfucker. We were friends. We are not friends anymore. ... How dare you go over my fucking head and talk to Cordy." ... Then, I said, `Joe, I had asked you if you were going to do anything. You assured me that you ... were going to talk to everyone of us before you left the other day and like always you never do. ... I didn't make a big deal about it, I just asked Cordy ... if you guys would get together and fix it. I didn't say anything other than, please help us.' And ... he said `Too bad. If you don't like it, get the fuck out. As a matter of fact, you're fired.' ... I said, okay."

Valenti hung up, noticed Cerami outside in the service aisle, and walked outside toward him. Immediately upon reaching Cerami, Valenti asked if the latter had said anything to Nickell about their conversation the day before. Cerami asked him what he was talking about, and Valenti

<sup>9</sup> Valenti admitted that he brought no documents to show Nickell as proof of his assertions. It is difficult to understand why Valenti believed Nickell would take any action without proof.

<sup>10</sup> Asked if Aguillard or Marshall knew that he was going to speak to Cerami that day, Valenti said "Yes. ... Because we discussed it ... as a matter of fact, Keith and myself were to go outside and speak to Mr. Cerami."

<sup>11</sup> According to Valenti, Vettraino must have prepared the invoice-signature copies of General Counsel's Exhibits Nos. 5(a) and (b) as such would have been the latter's only opportunity to have placed his own name on each document.

replied that Nickell had just said, over the telephone, he was fired. Cerami asked what he was going to do now, and Valenti replied by asking what Cerami wanted him to do; otherwise “I am going home. He just fired me.” Cerami replied, “Well, what am I going to do? I got customers coming in, and I need your help.” To this, Valenti asked Cerami what did the latter want him to do, and Cerami replied “... Well, then get out, go. I said, okay, and I went inside and packed up my stuff and left.” As he was driving home, according to Valenti, he decided to stop and telephone Cerami because “I’m shocked that he didn’t tell me to go back to my office and wait for Nickell to return . . . .” Thereupon, Valenti stopped at a service station, telephoned the dealership, and asked to speak to Cerami. When the latter came onto the line, Valenti said that he didn’t want to lose his job and would be happy to return to the dealership. “And he said ...

5 my stuff and left.” As he was driving home, according to Valenti, he decided to stop and telephone Cerami because “I’m shocked that he didn’t tell me to go back to my office and wait for Nickell to return . . . .” Thereupon, Valenti stopped at a service station, telephoned the dealership, and asked to speak to Cerami. When the latter came onto the line, Valenti said that he didn’t want to lose his job and would be happy to return to the dealership. “And he said ...

10 ‘Right now I’m so fucking mad with you I don’t even want to talk to you. Call me tomorrow between 9:00 and 11:00 a.m.’”<sup>12</sup>

Valenti next testified during direct examination that, the following morning (April 15), he telephoned Cerami at Respondent’s facility at approximately 9:40 a.m.; however, the latter failed to answer. Ten minutes later, Valenti called again, was transferred to Cerami’s voice mail, and asked Cerami to return his call.<sup>13</sup> While Valenti testified that Cerami failed to call him, Cerami denied receiving any telephone message from Valenti on this day. Valenti’s telephone records establish that he also made a telephone call to Nickell that morning between the two attempts to reach Cerami. The time of the call was 9:37, and, according to the Charging Party, Nickell, who, given the declining condition of his father-in-law, said he could not speak to him but would when he returned to work. Nickell denied this conversation. Valenti further testified that, the following week, on Tuesday April 19, he had a telephone conversation with Nickell,<sup>14</sup> who had returned to work that morning, and told Nickell he was sorry “all this happened” when his father-in-law was dying and he knew it had not been a “a good time for [Nickell].” Valenti added that “they should have waited until you got back so that we could get this thing fixed but ... I do want to come back to work. And he said ‘Cordy has already decided you’re done.’”

15 to answer. Ten minutes later, Valenti called again, was transferred to Cerami’s voice mail, and asked Cerami to return his call.<sup>13</sup> While Valenti testified that Cerami failed to call him, Cerami denied receiving any telephone message from Valenti on this day. Valenti’s telephone records establish that he also made a telephone call to Nickell that morning between the two attempts to reach Cerami. The time of the call was 9:37, and, according to the Charging Party, Nickell, who, given the declining condition of his father-in-law, said he could not speak to him but would when he returned to work. Nickell denied this conversation. Valenti further testified that, the following week, on Tuesday April 19, he had a telephone conversation with Nickell,<sup>14</sup> who had returned to work that morning, and told Nickell he was sorry “all this happened” when his father-in-law was dying and he knew it had not been a “a good time for [Nickell].” Valenti added that “they should have waited until you got back so that we could get this thing fixed but ... I do want to come back to work. And he said ‘Cordy has already decided you’re done.’”

20 when he returned to work. Nickell denied this conversation. Valenti further testified that, the following week, on Tuesday April 19, he had a telephone conversation with Nickell,<sup>14</sup> who had returned to work that morning, and told Nickell he was sorry “all this happened” when his father-in-law was dying and he knew it had not been a “a good time for [Nickell].” Valenti added that “they should have waited until you got back so that we could get this thing fixed but ... I do want to come back to work. And he said ‘Cordy has already decided you’re done.’”

25 to come back to work. And he said ‘Cordy has already decided you’re done.’”

Valenti testified that, late in the afternoon of the next day (April 20), he drove to Respondent’s facility and spoke to Nickell in the latter’s office. Nickell told Valenti he was being discharged, handed him his final check, and asked him to sign a document, dated 4/18/05 entitled Employee Separation Report. The document lists as the reasons for Valenti’s discharge-- abandoned job position; excessive tardiness, and failure to comply with time clock procedures. Valenti read the document but refused to execute it, saying he had been fired. Nickell replied that he had abandoned his job on April 14, and Valenti responded Nickell had fired him over the telephone earlier in the morning. At that point, according to Valenti, “I picked up my check and I left and went home.”

30 discharge-- abandoned job position; excessive tardiness, and failure to comply with time clock procedures. Valenti read the document but refused to execute it, saying he had been fired. Nickell replied that he had abandoned his job on April 14, and Valenti responded Nickell had fired him over the telephone earlier in the morning. At that point, according to Valenti, “I picked up my check and I left and went home.”

During cross-examination and rebuttal, Valenti testified inconsistently with his above-described events, and he contradicted himself on crucial points. Thus, at the outset, I note that Counsel for the General Counsel moved to amend the instant complaint only after Valenti

35 During cross-examination and rebuttal, Valenti testified inconsistently with his above-described events, and he contradicted himself on crucial points. Thus, at the outset, I note that Counsel for the General Counsel moved to amend the instant complaint only after Valenti

<sup>12</sup> Valenti’s telephone billing record shows two telephone calls that afternoon, one at 1:24 for seven minutes and the other at 1:46 for two minutes, to Respondent’s facility and one telephone call, at 1:49 p.m. for one minute, to Nickell’s cell phone. However, there is no record evidence regarding what, if anything, was said during these telephone calls.

40 <sup>12</sup> Valenti’s telephone billing record shows two telephone calls that afternoon, one at 1:24 for seven minutes and the other at 1:46 for two minutes, to Respondent’s facility and one telephone call, at 1:49 p.m. for one minute, to Nickell’s cell phone. However, there is no record evidence regarding what, if anything, was said during these telephone calls.

<sup>13</sup> Valenti’s telephone billing records confirm two one minute telephone calls to Respondent’s facility between 9:30 and 10:00 a.m. on April 15.

45 <sup>13</sup> Valenti’s telephone billing records confirm two one minute telephone calls to Respondent’s facility between 9:30 and 10:00 a.m. on April 15.

<sup>14</sup> Valenti’s telephone records show a three minute telephone call to Nickell’s cell phone at 12:38 p.m. and a three minute telephone call to Respondent’s facility at 12:48 p.m. on April 19.

50 <sup>14</sup> Valenti’s telephone records show a three minute telephone call to Nickell’s cell phone at 12:38 p.m. and a three minute telephone call to Respondent’s facility at 12:48 p.m. on April 19.

contradicted his earlier testimony regarding a consensus among the service advisors for instituting an open aisle appointment system. Further, regarding the asserted conversation between Courter Cerami and him at approximately 3:00 p.m. on April 13, during cross-examination, Valenti was confronted with his two pre-trial affidavits-- in the first of which, he stated that Keith Marshall accompanied him during the conversation and, in the second, he changed his version of the event, stating Marshall was not present during the conversation. Explaining his contradictory affidavits, Valenti admitted what precipitated his second affidavit was a conversation with Marshall, during which the latter informed Valenti he could not corroborate the former's testimony as to the event, and then averred "... I thought [Marshall] was with me. I went out thinking he was with me. I didn't hold his hand and he wasn't attached to me but I went out thinking he was with me because we both talked about going out to talk to Cerami .... I went forward with him. I thought he was behind me all the time but I never looked back until we were finished and he wasn't there." However, when counsel for Respondent pointed out to Valenti that, in the original affidavit, he described the conversation with Cerami as "... we told Cerami that we had proof . . ." and asked if, in fact, Marshall was present and he and Marshall spoke, Valenti now contradicted his second affidavit and, more significantly, his direct examination testimony, stating, "No, I did the talking but we were both there."

Next, regarding his testimony that, in response to Cerami's April 13 directive to him to gather the evidence, he located General Counsel's Exhibits Nos. 5(a) and (b), during cross-examination, Valenti initially reaffirmed his direct testimony, stating that, at the time he spoke to Cerami, the only proof he had, regarding Vettraino changing the names on signature copies of work orders, were the documents, which Aguillard had given to him during their conversation on April 5 or 6. He then almost immediately contradicted himself, stating, "Oh, you know what, I did have mine, too, because I did look up mine, too." Notwithstanding each is dated April 8, Valenti elucidated that he found the two work orders and corresponding invoice-signature copies immediately after "... she told me that that happened to her. She said, you ought to look and see if it has ever happened to you. I said ... I never thought this would happen. And when I did check, I found two." He added that he knew of General Counsel's Exhibits Nos. 5(a) and (b) when he spoke to Nickell on April 12. However, during rebuttal, after initially reiterating his cross-examination contradiction, Valenti again changed his testimony. Thus, when asked when he first learned he had not been paid for the repair work, set forth on General Counsel's Exhibit No. 5(b), he said, "I knew when I found this paperwork," and he found it on April 13-- "It was on the 13<sup>th</sup>." He added, "That was ... on the 13<sup>th</sup> is when I found all this out.... after Maritza gave me her repair order and I started looking at mine and I found a couple of them."

Concerning his asserted meeting with Aguillard and Marshall, during which the three service advisors first discussed their supposition that Dominic Vettraino was stealing commissions by altering the service advisor's names on invoice-signature copies of work orders, Valenti became contradictory as to when said meeting occurred and at what point he announced he would speak to Nickell on behalf of the others. Thus, notwithstanding his direct examination testimony that the meeting occurred on April 5 or 6, during rebuttal, when asked if it was in January 2005 when Aguillard showed him the work order, which, she believed, had been altered by Vettraino, Valenti testified, "Oh, no. It was long after that. She talked to me in April.... As a matter of fact, it was on the 13<sup>th</sup>." Asked if he was now testifying that he did not become aware of Aguillard's allegedly altered work order until the day prior to his discharge, the Charging Party, perhaps realizing the consequences, backtracked, stating "No, I would say probably a few days before ..." when "... she was talking about how she was sick and tired of getting ripped off ...." Moments later, as to the day on which the conversation occurred, he conceded, "I don't know if it was Friday, Monday. I know we discussed it prior to my talking to Mr. Cerami on the 13<sup>th</sup> at three o'clock in the afternoon." As to when Valenti announced he would speak to Nickell and the others assented, notwithstanding his certain direct testimony that

such occurred at the end of the above conversation with Aguillard and Marshall, during rebuttal, when asked what he said to Aguillard about going to Nickell with their common concern about being “ripped off,” the Charging Party stated, “... I said ... I’ll check and see if I have any ... and ... I’ll talk to Joe ....” Then, when he pulled his own repair orders, he told Aguillard, “... I’ll talk to Joe about these things, and I did.” Asked if he told Aguillard he would speak to Nickell during their initial conversation, Valenti said “No. I didn’t tell her at that time,” and “I never told her I was going to talk to Joe until I found mine and then I said look at this, I’ve got the same thing you do ....” He added that “this was, maybe Monday or Tuesday.... It was, maybe, Monday is when I found all these repair orders and told them ... I’m going to talk to Joe now ....”

Finally, Valenti contradicted himself with regard to the substance of three of his above-described conversations. Thus, during his direct examination description of his April 12 conversation with Nickell, Valenti did not specifically accuse Vettraino and depicted Nickell as ending their April 12 conversation by saying “... that he was going to be gone for a week or so.... but before I leave today, I will talk to each service advisor and get this fixed.” However, during cross-examination, he testified that he told Nickell of the “suspicion” held by Aguillard, Marshall and him that Vettraino “... has changed some repair orders” and that Nickell said “... he knew about it so he was ready to go talk to everybody, one at a time.” Further, regarding Valenti’s April 14 conversation with Cerami outside in the service aisle, notwithstanding his direct examination testimony that, at the end of the conversation, after asking Cerami what did Nickell want him to do, Cerami replied, “Well, then get out, go,” during cross-examination, he described himself as saying “I am going to go, what do you want me to do? . . . And he said, well, what am I going to do ... I got customers that have to be taken care of.... I don’t want you to leave me high and dry. And I said, well, what do you want me to do? You tell me, and he didn’t say anymore.” Asked if he then just turned and left the service aisle, Valenti replied, “Yeah, I guess.” However, moments later, asked by me what, if anything, Cerami said, Valenti reversed himself, stating, “I said, so what do you want me to do?” and Cerami replied “Nothing. He said, well, then go.” Moreover, concerning his conversation with Nickell on April 19, while, on direct examination, he testified that Nickell told him, “Cordy had already decided, you’re done,” during rebuttal, he changed Nickell’s words to “... they had decided that I hadn’t come to work, so I was no longer employed there.”

Given the enigmatic nature of the Charging Party’s testimony, the existence of any corroborative record evidence for his account is crucial. In this regard, Keith Marshall, who is paid on a different basis than the other service advisors as “I work mostly off of new cars and used cars” and whose commission is usually based upon “added things” at the time of purchase,<sup>15</sup> testified that, while such occurred “earlier” than the month of Valenti’s last day of work, he recalled having conversations with Aguillard and Valenti on a “couple” of occasions about Vettraino allegedly changing work tickets and receiving commission credit for the work.<sup>16</sup>

<sup>15</sup> Marshall’s wife is extremely ill, suffering from kidney failure and a rare disease called Wagner’s Disease. Also, he came to the hearing with Respondent’s general manager Cerami.

<sup>16</sup> According to Marshall, the final sheet, detailing the repairs made to the vehicle and the parts and fluids purchased and the total cost, should be done by the service advisor, who originally wrote the repair order, in order to ensure that everything necessary is on the final invoice copy. Occasionally, another service advisor may draft the final invoice if requested by the original service advisor. According to Marshall, this occurs only in emergency situations, and the original service advisor usually receives the commission. However, Marshall continued, the second service advisor will receive credit when the service manager feels “... that the initial service writer had not completely handled the customer fully ....”



On both occasions, the discussions concerned the employees' common belief "... that maybe [Vettraino] had changed names on some repair orders." Asked if they had any definitive evidence of Vettraino's perfidy, Marshall said "the only thing I can think of is ... Aguillard ... might have thought of one." He then added that "I believe" Valenti also had some definite documents, showing Vettraino had changed repair orders without permission. Asked if the three agreed that Valenti would speak to Nickell on their behalf about their problem with Vettraino, Marshall replied, "I don't remember ever agreeing to that ...."<sup>17</sup> However, he was able to recall that, while Valenti spoke for himself and not for either Aguillard or him, the Charging Party did go to Nickell on one occasion in order to express his own concerns. Further, Marshall specifically denied going with Valenti to speak to Cerami about their problem with Vettraino or observing Valenti speaking to Cerami.<sup>18</sup> On this point, Marshall added, "the only thing I remember is I believe when he went to Mr. Cerami's office, possibly a concern had grown that he went over Mr. Nickell's head and that is possibly why ...." Finally, Marshall testified that, after Valenti left Respondent's employ, Nickell asked Marshall to come to his office, and he "asked me if ... there was something going on at the time and ... if I was involved?" Nickell then mentioned that Valenti was "going against the company ... maybe bringing charges" and asked "... if I had any involvement. If maybe I ... was suing the company? Also, with regard to Valenti, Nickell said the former "... was frustrated at the time and he said it was becoming a trouble-making situation."<sup>19</sup>

Maritza Aguillard, who, while testifying, demonstrated a disturbing proclivity for confusing the Charging Party with Dominic Vettraino, contradicted both Valenti and Marshall. She testified that, in late January 2005, she went to Nickell regarding the payment of commission on a repair order. According to Aguillard, "... I went to his office and I told him that ... this certain ticket was mine and that it ... ended up in Dominic's name .... He said don't worry about it. I'm going to

---

<sup>17</sup> During cross-examination, Marshall said that, if he had anything to say to either Nickell or Cerami, he would do so "personally."

<sup>18</sup> Marshall was impeached by his pre-trial affidavit as to several answers during direct examination. Thus, while testifying an open aisle appointment system did not matter to him, in his affidavit, Marshall stated he was in favor of such a system. Also, while testifying he personally complained one time to Nickell about changing the name of the person taking credit for service orders, in his affidavit, Marshall said he complained to Nickell a few times. Further, while testifying no action resulted from his discussions with Aguillard and Valenti about the repair order problem, in his affidavit, Marshall stated that Valenti said he would speak to Nickell on behalf of Aguillard and him.

<sup>19</sup> Marshall was impeached by his pre-trial affidavit as to this conversation. In his affidavit, Marshall stated that Nickell asked if he was involved with Valenti and "are you a trouble-maker?" Also, Marshall stated that Nickell characterized Valenti as a problem starter and an agitator and said he was glad Valenti was no longer with the company.

After counsel for the General Counsel read the impeaching portions of Marshall's affidavit into the record, I asked the witness about the contradictions between his testimony and his affidavit, and Marshall replied that Valenti had applied "pressure to get me involved" and, at the time he gave his affidavit, "... I only had one side of the information a lot of the time, from Mr. Valenti." Also, he was "nervous" speaking to the Board agent "... because I have never been in this type of circumstances before."

take care of it. I'll take care of the commission."<sup>20</sup> She added that, while he never explained what had happened, Nickell, in fact, remedied the problem "on the next paycheck."<sup>21</sup> While admitting her concern at the time was that, without her permission, Vettraino had gone into the company computer system, removed her name, and replaced it with his on the repair invoice, she denied having bad feelings toward Nickell or Vettraino regarding the commission payment for the repair order, about Nickell's handling of it, or that the problem had lingered into April. Further, while denying Marshall, Valenti, and her ever discussed the possibility that Vettraino was infiltrating the computer system and substituting his name on work order invoices, she did recall a conversation with Valenti on the morning of his last day at work. Aguillard remembered the conversation as "... he was very upset ... and he told me ... he felt that Dominic was taking his tickets and that's when ... he asked ... has that ever happened to [me] and then I told him there was only one ...," and "... I told him that it was taken care of ... that Joe had taken care of the commission on that that same day I went to Joe and talked to him." Aguillard denied showing Valenti the disputed work order and invoice and claimed she had no knowledge of how Valenti may have obtained possession of the documents.<sup>22</sup> Moreover, she denied ever authorizing Valenti to speak on her behalf to Nickell or Cerami.

Respondent does not dispute that Valenti and service manager Nickell spoke on Tuesday, April 12 and that the Charging Party came to him with a problem involving Vettraino. Thus, according to Nickell, whose father-in-law, after aspirating, was critically ill in an intensive care unit at a local hospital at the time, sometime during the day, Valenti "... came into my office ... and he says Dominic stole a ticket.... He says that is not right. He stole a ticket." Nickell asked to which ticket he was referring, but Valenti did not have the impugned work order with him. Nickell's telephone then rang, and, while he spoke, Valenti left his office. Nickell testified that, while, Valenti failed to identify it, he was certain that the repair order, about which Valenti complained, was General Counsel's Exhibit No. 5(b) "because I changed that ticket and that is the only one I could think of." Shown the exhibit, Nickell replied, "This was a ticket that Nick Valenti wrote on the 8<sup>th</sup> of April," and "... I changed the adviser's name on it .... I went into the computer and [placed Dominic Vettraino's name on the invoice copy]." Continuing, Nickell explained that the customer, a woman, arrived with her vehicle that afternoon and said she would wait for the work to be finished at a nearby shopping mall.<sup>23</sup> Later, "I was in my office

---

<sup>20</sup> Aguillard testified that the rule is when you write up a repair order, you normally receive the compensation for it. However, there are exceptions, but "... [Nickell will] tell you about it ... before ... credit is given to anyone else." Asked if there are occasions that Nickell gives someone else the credit for a repair order, Aguillard said, "he may ... if ... I did half of the work and the other person did the other half, then he'll split it." She denied that full credit is ever given to the other service advisor.

<sup>21</sup> Joe Nickell corroborated this testimony. According to him, one day, Aguillard came to his office complaining she wrote a repair order but did not receive credit for it. She said that Vettraino had received the entire commission and not her. Nickell testified that, while Aguillard wrote the ticket, the customer was supposed to pick the car up the next day. On that day, Aguillard was sick, and Vettraino sold some additional work and drafted the ticket, which represented more dollars on the ticket than Aguillard's estimate. Nickell said he would take care of it and did so by paying Aguillard commission for the portion that she wrote up on the repair order.

<sup>22</sup> During rebuttal, Valenti reiterated that Aguillard gave him General Counsel's Exhibit No. 4.

<sup>23</sup> In Respondent's parlance, the woman was a "waiter," and such was stamped on her work order.

and I heard Nick's phone ring and it was 5:00 and I know it was his wife. He says, okay ... I am just getting ready to leave."<sup>24</sup> Shortly thereafter, Valenti left the dealership, and Nickell spent the next two hours helping Vettraino complete working with Valenti's remaining customers. Ten minutes before Respondent closed at 7:00 p.m., the woman, who had brought her car in earlier, telephoned the dealership, identified herself, asked if work on her car was completed, and asked to be picked up at the shopping mall. Her invoice had not yet been completed, and, after asking Vettraino to do so, Nickell left to pick up the customer and bring her back to Respondent's facility. Because Vettraino was the advisor who closed out the ticket after Valenti left, Nickell decided to award him commission credit for the entire ticket.<sup>25</sup>

According to witnesses who testified on behalf of Respondent, Valenti continued to protest his lost commission for General Counsel's Exhibit No. 5(b) during the following day (April 13). Thus, Nickell next testified that, at approximately 11:00 a.m., Valenti again came to his office, "... and says, this is not right. Dominic stole a ticket.... I says, Nick, the way you handled this, I made the change on the ticket and that is the way I left it.... There was nothing else.... He might have mumbled something, walking out of my office. I do not know." Later, having received word that the doctors had decided to give his father-in-law a dosage of morphine, Nickell immediately left the dealership and drove to the hospital at which his father-in-law was being treated.<sup>26</sup> Then, sometime during the afternoon, with Nickell no longer available, Valenti approached Courter Cerami in the latter's office, located off of the showroom floor. According to Cerami, "Mr. Valenti ... came into my office and sat down and said he felt there was a repair order that he had opened and that he was supposed to get credit on and the credit went to Dominic Vettraino. I asked him to give me the repair order and when Joe got back, we would sure investigate it and make a determination at that time." Cerami added that the conversation lasted no more than two or three minutes and that Valenti did not appear to be upset or angry.

Contrary to the General Counsel and Valenti, Respondent asserts that Valenti walked off, thereby abandoning, his job on April 14. According to its account of the events of that day, Dominic Vettraino was working during that morning<sup>27</sup> when, at approximately 8:30, Richard Peltomma,<sup>28</sup> who is Respondent's shop foreman and responsible for the work of the technicians, walked into Vettraino's service office and said he needed to speak to him. According to Vettraino, "We walked out to the service drive and ... he proceeded to tell me that Nick was accusing me of stealing a repair order from him and that he had gone to [Cerami]

---

<sup>24</sup> During rebuttal cross-examination, Valenti conceded that, on Friday, April 8, "... whether I left at 5:00 or 5:10 or 5:15 doesn't matter. My day ended at five o'clock."

<sup>25</sup> Asked how common it was for him to change credit on a work order from one service advisor to another, Nickell said, "Sometimes, it is going to happen.... one, two, three" times a week." Valenti disputed Nickell on this point, testifying that company policy was "... if you wrote the ticket, you got paid for it" and that such would be the case even if he had left early on Friday and Vettraino was forced to draft the invoice copy of the work order. He denied that Nickell would ever have authorized changing the name to Vettraino on the invoice.

<sup>26</sup> It was his intent to be away from work while his father-in-law remained in critical condition.

<sup>27</sup> Vettraino testified that he arrived at work on April 14 at 7:00 a.m. On this point, he was contradicted by Aguillard, who testified, on that morning, when she arrived at work at 8:00, Valenti, who had been working since 7:00, was the only service advisor working, and Vettraino did not arrive until "... about, maybe nine o'clock or so" because he had a doctor's appointment.

<sup>28</sup> Vettraino stated that they are friends.

about it the afternoon prior ....”<sup>29</sup> Purportedly, this revelation “made [Vettraino] pretty angry,” and he immediately “... walked to the back of the shop, got on [his] cell phone, and called [Nickell].” Vettraino testified, “I told him what Richard told me. I told him that we were very, very busy. Nick was not really pulling his weight.” Also, “I think I told him that [Maritza] seemed to be ignoring me. Nickell corroborated Vettraino regarding this telephone conversation.

5 According to the former, between 8:30 and 9:30 a.m., while the hospital nurses were changing his father-in-law’s bedding, he and his wife went to breakfast. On the way, Vettraino called on his cell phone and seemed to be upset. Nickell asked what was wrong, and Vettraino said, “... Nick Valenti is accusing me of stealing a ticket ... and he has even gone to [Cerami] about this. He says, I do not feel right about this situation. We are really busy.... Nick is not taking care of any customers and it feels like Maritza is ignoring me this morning ....” Nickell responded that he was at the hospital and couldn’t do anything. He suggested that Vettraino “get a grip” and “make it happen for me.”

15 Nickell, who was understandably preoccupied with the illness of his father-in-law, testified that he was, nevertheless, concerned that his service advisors were not adequately performing their jobs and that, after hanging up with Vettraino, he telephoned the dealership. According to him, Valenti answered, and Nickell asked to speak to Aguillard. When she came onto the telephone, Nickell told her he understood no one was helping customers. She denied it and said she was busy, Vettraino was busy, and Valenti was not doing anything.<sup>30</sup> Nickell then asked to speak to Valenti again, and, when the latter answered, asked “... what the hell is going on? He says, Dominic stole a ticket and I says, Nick ... I told you yesterday that I took that ticket and he says, that is a bunch of bullshit, you know. That is taking money out of my pocket and I says, Nick, I took the ticket ..... what is going on there. He says ... everything was bullshit and I says, I need you to buckle down and start taking care of customers. I hear you are not pulling your weight this morning and he says, well, now you know ... I just do not feel because of Dominic stealing the ticket and I says, I wish you would get off of that and I need you to buckle down and get the fuck to work.” Nickell testified that this was the end of the conversation and they “hung up.” Moments later during his testimony, asked by Respondent’s counsel if he mentioned Cerami during his conversation with Valenti, Nickell averred, “I might have said, why would you go to Cordy?” Asked by me at what point during the conversation he said this, Nickell, who admitted his voice became “elevated,” replied, “When he was not doing his job when I was telling him to go ... do his job and when he was saying that ... Dominic stole a ticket ... and then, at that time ... my voice was elevated and I says ... Nick, I cannot believe you

35 <sup>29</sup> Of course, Vettraino’s testimony about what Peltomma said was hearsay, and it was uncorroborated. Thus, Peltomma, who testified at the hearing on behalf of Respondent, failed to testify regarding having knowledge that Valenti was accusing Vettraino of stealing a repair order from him, being a witness to the April 13 conversation between Valenti and Cerami, or reporting on what he knew to Vettraino. Moreover, it appears highly unlikely that Peltomma was a witness to the Valenti-Cerami conversation. On this point, Valenti denied that Peltomma was present when he spoke to Cerami, and the latter failed to mention the presence of Peltomma in his office while Valenti spoke to him. Further, it is unlikely that either Valenti or Cerami would have disclosed what was discussed during an obviously private conversation to Peltomma.

45 <sup>30</sup> Aguillard testified that, when she picked up the receiver, Nickell seemed “a little upset” and, without mentioning a conversation with Vettraino, asked why customers were not being helped, said he needed the service advisors to work together and help each other. Aguillard replied that she did not know what Nickell was talking about and said she was taking customers one at a time and “busting her butt off ....”

would even go to Cordy ....<sup>31</sup> Nickell specifically denied ever saying to Valenti he was fired or anything, which Valenti would have construed, as meaning he was fired.<sup>32</sup>

Respondent does not dispute that, shortly after speaking to Nickell, Valenti walked out of the service department and approached Cerami, who was on the service aisle. The latter testified that Valenti came “firing” from the service office and approached him “pretty aggressively.” Valenti stopped no more than a foot from Cerami and was yelling, saying “... what did you say to him? What did you say to him? I am out of here.” According to Cerami, he asked Valenti, who “was pretty animated” with “his arms ... flailing,”<sup>33</sup> what was he talking about, and Valenti continued to yell.<sup>34</sup> Cerami responded, saying “... you cannot leave us high and dry.... we are short-handed. Joe is not here.... We have customers all over the place and you need to calm down and get back to work.” At this point, Valenti grabbed the lapel of his coat, ripped off his magnetic name tag,<sup>35</sup> said “... I am out of here,” and walked away from Cerami. Continuing, Cerami recalled that Valenti did say it was Nickell to whom he assertedly spoke and that he replied, “... I do not know what you are talking about. I never talked to him. I did not say anything to him.” Further, Cerami denied directing Valenti to leave Respondent’s facility-- “I did not direct him to go home .... In fact, asked him to calm down and go back to work” because “we are short-handed.”<sup>36</sup> Finally, Cerami testified that, even if Valenti had said Nickell had fired him, he (Cerami) would have “... brought him into my office and sat down and found out what was going on and attempt[ed] to contact Mr. Nickell and [done] it properly the way we are supposed to do it ....” And, “if we could not make a determination, I would have suspended him until I spoke to Mr. Nickell.”<sup>37</sup> After Valenti walked away, Cerami returned to his office, thought about the situation, and walked back to the service department. There, “... I noticed that Mr. Valenti’s desk was cleared off and I went back to my office.”<sup>38</sup> Later, he telephoned Vettraino, and requested that the latter come to his office. Vettraino did so and told Cerami that Valenti had gathered all of his personal items and “stormed out of the place.”

---

<sup>31</sup> Nickell denied any conversation with Cerami about this.

<sup>32</sup> Nickell stated that, while he could recommend, he had no authority to discharge employees. According to Nickell, the procedure was for him to recommend and then he and Cerami would review the employee’s personnel file and the alleged “infraction that happened.” From this, Cerami would make the ultimate discharge decision.

<sup>33</sup> Richard Peltomma’s testimony only concerned this point, and he corroborated Cerami that, during his conversation with Cerami, which Peltomma witnessed from a distance, Valenti “flung his arms up” and he was “right in Mr. Cerami’s face” as he spoke.

<sup>34</sup> Corroborating Nickell, Cerami denied speaking to Nickell after the latter left Respondent’s facility on April 13.

<sup>35</sup> During rebuttal, Valenti denied this act and produced his name tag.

<sup>36</sup> Cerami stated that, by leaving early, Valenti negatively impacted Respondent’s ability to service its customers; for, when customers, for whom he had prepared repair orders, called with inquiries about their cars, other service advisors, who had no knowledge of any problems, were forced to cover for him.

<sup>37</sup> Cerami added that Respondent’s process for discharging employees includes reviewing the employee’s personnel file, gathering evidence, and making a determination. Further, discharged employees are paid “immediately upon termination” as “I believe it is the law.”

<sup>38</sup> Explaining his lack of initial curiosity even though he was admittedly “clueless” about what Valenti may have done, Cerami said he did not want to interrupt anyone who was with a customer.

Cerami testified that, shortly after lunch, he received a telephone call from Valenti, who said, "I do not want to lose my job. Can I come back? I said, I am going to need to speak to Mr. Nickell before you can come back." Cerami denied informing Valenti he had been fired and denied using any profanity during this conversation. He added, at that point, he "was not sure" if Valenti would report for work the next day and denied forbidding him from doing so.<sup>39</sup> However, Cerami conceded, if Valenti had come to Respondent's facility, "I probably would have suspended him at that time" based upon what transpired the day before. Finally, Cerami stated, "I received no messages" from Valenti after April 14, and "he never left a message in my voice mail, and I never spoke to him."

Nickell's father-in-law died on Friday, April 15, and he did not return to work until the following Tuesday, April 19. According to Nickell, when Cerami arrived at Respondent's facility, they immediately met in Cerami's office. "He gave me my condolences over my father-in-law, and then we had a discussion what happened with Mr. Valenti the prior Thursday." After Cerami gave his account of what occurred, they discussed "what we should do in the circumstances of Nick leaving his job," and they concluded "... that he abandoned his position." Then, they discussed "... what we should do ... if we should terminate Mr. Valenti or not.... Mr. Cerami was very solid .... We ought to terminate him, just for the insubordination that he did in front of customers and other employees on the service drive.... We said, yes, this is what we are going to do," and the decision was taken to terminate Valenti "for abandoning ... his job." At some point during the meeting, Nickell left in order to speak to a customer and take some telephone calls. He returned, and the two men requested that Valenti's personnel file be brought to Cerami's office. Thereafter, "we reviewed everything that was in his ... file as far as write-ups, tardiness, anything like that. We always do that ... before we terminate." Asked the reason for discharging Valenti, Nickell responded "abandonment of his job .... because he left his post on his own terms."<sup>40</sup> After they finished reviewing Valenti's personnel file, at approximately 9:00, Nickell received a telephone call from Valenti, who began by saying "... you know, Joe, I blew it. I screwed up. I hope I still have a job. As a "put off type of thing," Nickell replied, "... Nick, I do not know yet. I will call you ...."<sup>41</sup> Cerami corroborated Nickell that, early on April 19, the two met in order to discuss what to do about Valenti. Nickell told Cerami about his telephone conversation with Valenti early on April 14, and Cerami told Nickell his account of what occurred when Valenti confronted him on the service aisle later that morning. Cerami stated that he told Nickell that Valenti "... had left me.... he said, I am out of here and grabbed his stuff and left and did not show up the next day and the following day. He was scheduled ... Friday, Saturday, and Monday and he was not there any one of those days."<sup>42</sup> Cerami further corroborated Nickell that they reviewed Valenti's personnel file, "... his entire employment file. We reviewed his timesheets ... any warnings that were in the file. We took into consideration

<sup>39</sup> Valenti did not report for work on April 15, and Cerami was not "surprised" at his absence.

<sup>40</sup> Nickell stated emphatically, "... my reason was because he left his position." Asked if there were other reasons, he mentioned "insubordination" and "after reviewing his employee file, time clock procedures.... seeing that he was always tardy." Nevertheless, Nickell conceded that Respondent would not have terminated Valenti but for abandoning his job.

<sup>41</sup> During cross-examination, Nickell changed his testimony, stating, after Valenti asked he still had a job, he said, "... right now, I could not tell you because I did not have all the information from Mr. Cerami." Contrary to his direct examination testimony, Nickell asserted that this conversation occurred when he stepped out of his meeting with Cerami and that what he told Valenti was the truth as, at the time, he did not know Valenti would be terminated.

<sup>42</sup> Of course, according to his earlier testimony, if Nickell had reported any of those days, Cerami would have immediately suspended him.

how long he had been on the job there.” The decision was made to terminate Valenti, and, upon being shown Valenti’s separation report, which lists abandoning his position, excessive tardiness, and failure to comply with time clock procedures as the reasons for his discharge,<sup>43</sup> Cerami stated, “I believe the abandonment of the position carried more weight than the others,” and he conceded that, absent what occurred on April 14, Valenti would not have been discharged.

Later, in the afternoon, Nickell telephoned Valenti and told him to come to the dealership the next morning for a meeting. The next day (April 20), Valenti arrived at the dealership, and he and Nickell met in the latter’s office. According to Nickell, “he came in and he was pretty humble at the time, and I says, you know, Nick, [we] worked together many years. You are a good friend ... but under these circumstances, we have to part company and you are no longer employed here.” Nickell then gave him a final check and asked him to sign the separation report, which Valenti refused to do. According to Nickell, after Valenti left, he realized Valenti had not returned a company Nextel telephone. He immediately telephoned Valenti, invited him to lunch the next day, and asked him to bring the telephone with him. Nickell added that the two men did meet for lunch the next afternoon and discussed possible job prospects for Valenti and “what transpired” regarding his termination.

#### IV. Legal Analysis

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging Valenti because he engaged in protected concerted activities-- complaining to Nickell and Cerami on behalf of himself and two other employees about another employee taking credit for repair orders, which they had originally drafted. There is no dispute regarding the legal framework to be applied as to this allegation. Thus, as set forth by the Board in *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB No. 33, slip. op. at 3 (June 5, 2006), “the Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation.... To prove a violation ... the General Counsel must first show that protected activity was a motivating factor in the Respondent’s decision to take adverse action against the alleged discriminatee. The General Counsel can satisfy this initial burden by proving that the alleged discriminatee engaged in protected activity, that the Respondent was aware of it, and that the Respondent demonstrated that the some animus toward that protected activity. The burden then shifts to the employer to demonstrate that the same adverse action would have occurred even absent the protected activity.”<sup>44</sup>

In order to determine what occurred herein so as to utilize the foregoing legal framework, it is initially necessary to resolve the credibility of the several witnesses. On this point, notwithstanding having cautioned the several witnesses about the importance of the oath and

---

<sup>43</sup> According to Nickell, while working for Respondent, Valenti was habitually tardy reporting for work in the morning. Thus, Respondent opens its facility for service customers at 7:00 a.m. each day, and “[Valenti] was constantly late. I had to make sure I was there because one advisor would not be able to take care of the appointments ..., and “I would take care of Nick’s customers.” Nickell added that he counseled Valenti “many times” regarding this problem-- “I told him you need to start leaving a little bit earlier from the house, but it was always ... it is a traffic problem.”

Valenti admitted that he was once “verbally” warned about being late in the morning but denied “constantly” being late-- I’m sure I was late like everybody else.”

<sup>44</sup> The *Wright Line* citation is *Wright Line*, 251 NLRB 1083 (1981), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981).

the absolute necessity for being truthful, I must profess that none of them impressed me as testifying honestly. In any event, Nick Valenti's demeanor, while testifying, was that of a rather guileful witness, one, who, during direct examination, contrived a version of reality sufficient to satisfy Counsel for the General Counsel's initial burden of proof but, during cross-examination, became enmeshed and lost in the minutia of his deceitful testimony. In this regard, I described above the numerous inconsistencies (including the date of his initial conversation with Marshall and Aguillard, the date of his discovery of General Counsel's Exhibits Nos. 5(a) and (b), and at what point he assertedly announced to Marshall and Aguillard he would speak to Nickell on their behalf) and utter contradictions (including the existence of a consensus regarding the service advisors' desire for an open aisle appointment system, whether Marshall accompanied him while he spoke to Cerami on April 13, and the substance of his conversation with Nickell on April 12) rampant throughout his testimony. Likewise, I found Keith Marshall's demeanor, while testifying, to have been that of a disingenuous witness. In particular, perhaps for fear of jeopardizing his employment status due to the precarious health of his wife or for other reasons, I believe he demonstrated a bias for Respondent's position, and he was impeached by his pre-trial affidavit concerning several aspects of his testimony. As to this, I found his explanations for said inconsistencies and, indeed, for the veracity of his entire pre-trial affidavit labored and fallacious. In short, I believe Marshall neither understood nor abided by the oath, which I administered to him prior to his testimony.<sup>45</sup>

Regarding the other two service advisors, Maritza Aguillard did not impress me as being candid. I note that she contradicted Valenti and Marshall as to whether they ever discussed the possibility Dominic Vettraino was altering invoice copies of their work orders and, thereby, stealing commissions from them and Vettraino as to whether he was working between 7:00 and 9:00 in the morning of April 14. While she may have been truthful on these points, she most certainly fabricated her denial that she gave copies of General Counsel's Exhibit No. 4, her January 26, 2005 work order, to Valenti, for, based upon my understanding of Respondent's record-keeping, the latter could only have obtained all the copies of this work order from Aguillard. Also, rather than being straightforward, Dominic Vettraino appeared to be testifying in a manner wholly calculated to bolster Respondent's position during the hearing. In particular, while he testified he telephoned Nickell early on April 14 in order to inform the latter that Valenti had approached Cerami and accused him of stealing a commission, his testimony, that Richard Peltomma had informed him of the foregoing, is, of course, hearsay. Moreover, inasmuch as Peltomma, who testified on behalf of Respondent, failed to substantiate Vettraino's testimony, the latter's testimony was uncorroborated hearsay and, in these circumstances, I give it no weight as fact.<sup>46</sup> Further, that he even made his asserted telephone call to Nickell is doubtful. Thus, while Vettraino asserted that he had been working that morning since 7:00 and spoke to Peltomma at approximately 8:30, Aguillard contradicted him, testifying that Valenti was alone working from 7:00 until 8:00 a.m. and that, due to a doctor appointment, Vettraino did not even arrive at work until approximately 9:00 a.m.

---

<sup>45</sup> While counsel for the General Counsel requested that I give probative weight to the contents of Marshall's pre-trial affidavit, counsel utilized it only for purposes of impeachment. In these circumstances, there is nothing in the federal rules of evidence which would permit the affidavit's use as evidence of fact.

<sup>46</sup> By either Valenti's or Cerami's version of their April 13 conversation, Peltomma was not a witness. Thus, Valenti denied Peltomma was present, and Cerami testified that only he and Valenti were in his office while they spoke. Further, I do not believe either discussed their private conversation with Peltomma.



Next, while, for the same reasons, the tenability of Joseph Nickell appeared, to me, to have been as dubious as that of Vettraino, unlike the latter, he did not impress me as utterly lacking in candid. Nevertheless, while Nickell ostensibly corroborated Vettraino, I reiterate my belief that Nickell's asserted April 14 telephone conversation with the former, a substantial underpinning of Respondent's defense, may never occurred. Moreover, I note that, during his initial account of his conversation with Valenti minutes later, Nickell failed to mention questioning Valenti as to why he spoke to Cerami on April 13 and that, only after a leading question from counsel, did Nickell aver that, in an "elevated" voice, he said to Valenti, "... Nick, I can not believe you would even go to Cordy." This inconsistency is, of course, of some import inasmuch as Respondent's proffered evidence suggests that Nickell's anger about Valenti going behind his back to Cerami precipitated the Charging Party's subsequent confrontation with Cerami. Also, I note that Nickell's testimony with regard to his April 19 morning telephone conversation with Valenti, was contradictory. Finally, while, unlike other witnesses, Courter Cerami's demeanor, while testifying, was not that of a mendacious witness, I believe he similarly fabricated testimony in order to buttress Respondent's position at trial. In particular, I do not believe his denial of having spoken to Nickell between the time the latter left Respondent's facility in order to spend time with his dying father-in-law and his return to work and believe that the source of Nickell's knowledge of the occurrence and the substance of Cerami's April 13 conversation with Valenti could only have been Cerami.

In the foregoing circumstances, given my doubts as to the inherent credibility of each of the witnesses, reaching precise conclusions as to what occurred herein is a futile task. Bluntly put, not one witness was worthy of my complete trust as to his or her veracity, and, in these circumstances, assessing one witness's candor against that of another is akin to selecting the lesser of two evils and not a productive exercise for determining facts. Nevertheless, while the substance of these conversations is disputed, that Valenti and Nickell spoke on April 12, that Valenti and Cerami spoke on April 13, that Valenti angrily confronted Cerami on April 14 regarding whether the latter had divulged the substance of their April 13 private conversation to Nickell, and that Valenti left Respondent's facility shortly after speaking to Cerami on the latter date are facts not in dispute. Further, given Valenti's testimony and the reluctant corroboration of Marshall, contrary to Aguillard, I find that the three service advisors probably did engage in discussions regarding Aguillard's belief that Vettraino stole her commission for the work order dated January 26, 2005, General Counsel's Exhibit No. 4, and that, during the course of said conversations, Aguillard gave Valenti copies of the above documents. However, given the discrepancy between Valenti and Marshall as to whether these discussions occurred in April 2005 or earlier and Valenti's inconsistent testimony as to when in April said discussions occurred, it is impossible to precisely determine the date of these conversations, and, given the lack of corroboration, Valenti's delusive demeanor, his entirely inconsistent and contradictory testimony and, in particular, his inconsistent testimony as to at what point he offered to speak to Nickell on behalf of Marshall and Aguillard, I can not rely upon the Charging Party to find that either he offered to speak to Nickell on behalf of the other two service advisors or they ever authorized him to speak to Nickell on their behalf. Moreover, in the above circumstances, especially noting Valenti's inconsistent testimony as to when he initially became aware of General Counsel's Exhibit No. 5(b) and discovered that Vettraino had received credit for the commission payment and his contradictory testimony regarding the substance of his April 12 conversation with Nickell, I can not place any reliance upon Valenti to find that his complaint, during his conversations with Nickell on April 12 and Cerami on April 13, concerned the service advisors' nebulous accusations of theft of commission payments for service orders, possibly by Vettraino. Rather, it is more likely that, having ascertained Vettraino had received commission credit for the above work order, Valenti's complaint to Nickell and to Cerami specifically concerned his accusation that Vettraino had stolen a commission payment, which should have been credited to him. In these circumstances, viewing the case from the standpoint of the

Wright Line burdens of proof, even assuming, during their April 14 conversation, Nickell exclaimed to Valenti he was fired for speaking to Cerami on April 13,<sup>47</sup> as there is no credible evidence that Respondent was ever aware that Valenti had engaged in discussions with other service advisors regarding possible theft of their service order commissions, that Valenti ever engaged in the protected concerted activities alleged in the instant complaint, or that Respondent was motivated by any protected concerted activities in which the Charging Party engaged, the General Counsel failed to meet its initial burden of establishing that Respondent was unlawfully motivated in allegedly discharging Valenti. Accordingly, I shall recommend dismissal of paragraph 5 of the instant complaint.

Turning to the independent allegations of violations of Section 8(a)(1) of the Act, the General Counsel initially alleges that, during a telephone conversation, Respondent unlawfully told an employee that he was fired for engaging in protected concerted activities. Of course, in this regard, Valenti testified that, at the end of his telephone conversation with Nickell on April 14, the latter told Valenti he was fired presumably for going behind his back and speaking to Cerami about the service advisors' amorphous complaints of commission thefts. However, while, as noted above, I have difficulty with an aspect of Nickell's version of the telephone conversation and while he was obviously upset with Valenti for speaking to Cerami, I am unable to rely upon Valenti's misshapen view of reality, including that, rather than his own specific complaint against Vettraino, he complained to Nickell and Cerami regarding the service advisors' amorphous allegations of theft. Further, as stated above, I do not believe it likely that Nickell would have told Valenti he was fired. In these circumstances, I shall recommend dismissal of paragraph 6(a) of the instant complaint.

The final two allegations of independent violations of Section 8(a)(1) of the Act in the instant complaint concern Keith Marshall. The first involves an allegation of unlawful interrogation, and, in this regard, Marshall testified that, subsequent to Valenti leaving Respondent's employ, Nickell asked Marshall to come to his office and then asked the latter "... if ... there was something going on at the time and ... if I was involved?" Nickell then mentioned that Valenti had filed unfair labor practice charges against Respondent and asked "... if I had any involvement. If maybe I was suing the company?" As all parties recognize that interrogations of employees are not *per se* unlawful and that the test for unlawful interrogation is, as stated by the Board in *Rossmore House*, 269 NLRB 1176, 1177 (1984), "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." Among the surrounding circumstances to be considered are the background, the nature of information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Herein, the facts are that the service manager called Marshall into his office, and, with just the two of them present, asked the employee about his possible involvement in an unfair labor practice investigation. Respondent offered no evidence as to Nickell's purpose, and I can see no valid reason for the service manager's questioning of Marshall. Bluntly put, whether an employee has agreed to give evidence during an NLRB investigation or whether he is contemplating filing an unfair labor practice charge are the concerns of the employee and not the legitimate concerns of his employer and represent conduct protected by the Act. In these circumstances, I agree with the General Counsel that Nickell's conduct was violative of Section 8(a)(1) of the Act.

---

<sup>47</sup> Given his familiarity with Respondent's procedures for terminating employees, it is not likely that Nickell would have uttered what is attributed to him by Valenti. Further, assuming Nickell did, in fact, tell Valenti he was fired, I do not believe it likely that Cerami, who certainly understood Respondent's procedures, would have endorsed Nickell's impetuous act.

The second allegation of violation of Section 8(a)(1) of the Act is that Nickell told Marshall that Valenti had been terminated for engaging in protected concerted activities. As to this, according to Marshall, after interrogating him, Nickell said that Valenti "... was frustrated at the time and he said it was a trouble-making situation." Counsel for the General Counsel argues that Nickell was referring to Valenti's protected concerted activities; however, he may just as well have been referring to the filing of the instant unfair labor practice charge, which was the subject of the interrogation and which was obviously troubling to Respondent. Given the vague nature of Nickell's comment, I do not believe it was coercive, and, accordingly, shall recommend that paragraph 6(b) of the complaint be dismissed.

### Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating an employee as to whether he was involved in the filing of an unfair labor practice charge by a former employee, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

3. The aforementioned unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. Respondent engaged in no other unfair labor practices.

### The Remedy

I have found that Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act. Accordingly, I shall recommend that it be ordered to cease and desist from engaging in such acts and conduct and to take certain affirmative actions, including the posting of a notice, designed to effectuate the policies and the purposes of the Act.<sup>48</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>49</sup>

### ORDER

Respondent, Infiniti of Montclair, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

a. Interrogating employees as to their protected concerted activities and the protected concerted activities of their fellow employees.

<sup>48</sup> Respondent's unfair labor practice should not be considered to be an isolated or *de minimis* act. The sanctity of the Board processes must be protected from employer restraint or coercion designed to frustrate employees from participating freely.

<sup>49</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days after service by the Region, post at its facility, located in Montclair, California copies of the attached notice marked "Appendix."<sup>50</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 2005.

b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

**Dated: Washington, DC August 16, 2006**

**Burton Litvack**  
**Administrative Law Judge**

<sup>50</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

**NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** interrogate you regarding your above-described protected concerted activities or the protected concerted activities of your fellow employees.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

**INFINITI OF MONTCLAIR**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

888 South Figueroa Street, 9th Floor, Los Angeles CA 90017-5449  
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5229.